

**LEBOEUF, LAMB, GREENE & MACRAE**
L.L.P.

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATION S

NEW YORK
WASHINGTON, DC.
ALBANY
BOSTON
DENVER
HARRISBURG
HARTFORD
HOUSTON
JACKSONVILLE
LOS ANGELES
NEWARK
PITTSBURGH
SALT LAKE CITY
SAN FRANCISCO

1000 KEARNS BUILDING
136 SOUTH MAIN STREET
SALT LAKE CITY, UT 84101

(801) 320-6700

FACSIMILE: (801) 359-8256

E-MAIL ADDRESS: KEVIN.MURRAY@LLGM.COM

WRITER'S DIRECT DIAL: (801) 320-6754

WRITER'S DIRECT FACSIMILE: (801) 359-8256

LONDON
(A LONDON-BASED
MULTINATIONAL PARTNERSHIP)

PARIS

BRUSSELS

JOHANNESBURG
(PTY) LTD

MOSCOW

RIYADH
(AFFILIATED OFFICE)

TASHKENT

BISHKEK

ALMATY

BEIJING

**PUBLIC
DOCUMENT**

May 19, 2004

Via Facsimile

Matthew D. Cohn
Environmental Protection Agency
Region VIII - 8RC 999 18th Street, Suite 500
Denver, CO 80202-2466

Re: Vermiculite Intermountain Site, Salt Lake City, Utah

Dear Matt:

Mike Jenkins asked that we respond to your letter dated April 27, 2004 in order to expedite the process while Mike is on work-related travel. We understand that David Wilson will be meeting with Floyd Nichols this week regarding this site and will be prepared to present Floyd with PacifiCorp's draft Work Plan. PacifiCorp's previous idea of preparing two separate Work Plans to address the remediation of the interior of the control building and remediation of soils has changed. The Work Plan EPA will receive in a few days actually addresses both activities, in two phases. PacifiCorp will also provide Floyd with a copy of its draft Health and Safety Plan, draft Sampling and Analysis Plan, and detailed specifications for the control building remediation work. PacifiCorp has already selected a contractor to perform the work on the control building and is planning to select a contractor for the soil remediation within two to three weeks. PacifiCorp is ready to implement the work immediately, as soon as EPA approves the Work Plan and related deliverables and the parties are able to resolve the Administrative Order on Consent ("AOC").

Unfortunately, a number of issues with respect to the AOC remain to be resolved before PacifiCorp would be in a position to execute the document. The following comments relate to EPA's April 27th draft. References to Mike Jenkins' letter refer to his letter to you dated April 22, 2004. The following discussion assumes your familiarity with the previous correspondence.

1. Work Plans. As discussed above, in Paragraph 8, final item, and Paragraph 15, PacifiCorp now intends to submit one consolidated Work Plan that is divided into two phases of work (control house and soils). This revision will need to be made throughout the AOC.

2. Findings of Fact. Despite the discussion in your letter, PacifiCorp nevertheless has serious objections about EPA's characterization of the facts. We recognize that the statements made in this section are EPA's findings of fact and not those of PacifiCorp. However, PacifiCorp can not sign a document that suggests that any vermiculite-related operations, including exfoliation, in fact occurred on what is now PacifiCorp's property prior to 1954 (see subparagraphs 2 and 6). As explained in Mike Jenkins' letter, at most, from available evidence, one can deduce that vermiculite was shipped to some location on behalf of Vermiculite Intermountain (via Utah Lumber) between 1944 and 1954, but the location is not known. If the shipments went to the city block where Utah Lumber and Vermiculite Intermountain facilities were located, one could presume that storage and distribution operations occurred somewhere on that block in connection with those shipments, but nothing more. There is nothing in the records linking PacifiCorp's current property with these activities prior to 1954. In spite of our apparent disagreement on this issue, we believe that the language is unnecessary; there is no need for the AOC to address the precise nature of historic operations since it is undisputed that an exfoliation plant did in fact operate on what is now PacifiCorp's property from 1954 until 1984, and those operations resulted in asbestos contamination. These facts, without more, are sufficient to provide a jurisdictional basis for EPA to enter into the AOC.

In addition to the findings regarding historic operations, PacifiCorp continues to object to the unnecessary conclusions regarding relative exposure risks to Libby Amphibole asbestos. As explained in Mike Jenkins' letter, PacifiCorp objects to the undefined references to "high levels" in the third, fourth, and sixth subparagraphs. The fact is that EPA's testing shows that asbestos at the PacifiCorp property is under 1%. PacifiCorp would not object to a finding of the specific limit. In the alternative, EPA could find simply that the asbestos levels discovered at the PacifiCorp Property are above action levels set at Libby. It is unnecessary, confusing, and potentially misleading to ascribe a subjective "high" qualification to the amount of asbestos discovered at the PacifiCorp Property.

PacifiCorp also strongly objects to the statement in the fifth sub-paragraph that "human exposure to the amphibole asbestos found in the Libby vermiculite concentrate causes asbestos-related diseases" While there is no doubt that exposure to asbestos is a contributing factor relating to, or in fact causes asbestos-related diseases with respect to a percentage of people exposed (even a high percentage), it is simply not true that every single instance of exposure will in fact result in disease. We believe the statement is unnecessary in this document. We also remain concerned that the statement is inaccurate and inflammatory and could potentially produce an overreaction to what will become a public document. If you insist on leaving

the statement in the document, we could accept a statement altered by inserting the phrase "may cause" in lieu of "causes."

3. Conclusions of Law. While PacifiCorp still objects to the conclusions of law for the reasons set forth in Mike Jenkins' previous letter, in the interest of expediting this process, PacifiCorp understands that the agency has a right to reach legal conclusions it deems appropriate.

4. Reporting. PacifiCorp will interpret the provisions of Paragraph 19(c) relating to reporting of a conveyance of interest in the PacifiCorp Property as being effective only until completion of the work. Because a clean closure is anticipated, notice to hypothetical future owners is not relevant.

5. Final Report. PacifiCorp objects to Paragraph 20 to the extent that it requires PacifiCorp to provide EPA with copies of its contracts with remediation contractors, environmental consultants, and legal counsel.

7. Split Samples. In paragraph 17.c., the second sentence should read that Respondent and EPA will notify the other party not less than three days in advance of any sample collection activity.

8. Off-Site Shipments. PacifiCorp will interpret Paragraph 21(b) as applying to wastes shipped off-Site for disposal in connection with completion of the work outlined in the Work Plan. Taken literally, Paragraph 21(b) may apply to disposal of office supplies (such as white out) or to vehicles driven off-Site (due to the presence of used lube oil, lead-acid batteries, ethylene glycol, etc.).

9. Access. Despite the revisions in the last draft of the AOC, PacifiCorp remains concerned about the scope of EPA's access provision (Paragraph 22) for the reasons stated in Mike Jenkins' letter. PacifiCorp is without authority to agree, and even if it had authority would not agree, to permit access to the sub-station facility by any third party without having a trained journeyman present. PacifiCorp is willing to agree, however, that nothing in Paragraph 22 constitutes a limitation on EPA's access rights as provided by law. With respect to 40-hour training, the linemen will be present for the sole purpose of ensuring the protection of human health in relation to electric hazards, nothing more or less. They will not direct any work, perform any remediation work, take any samples, or perform any functions with respect to hazardous substances. Therefore, there is no reasonable reason to ensure they are 40-hour trained. But even so, PacifiCorp notes that 40-hour HAZWOPER training programs do not directly or indirectly address asbestos. As a result, the industry practice is to have personnel trained pursuant to the AHERA asbestos standards. PacifiCorp is willing to ensure that all journeymen who accompany EPA or the State during such access are appropriately trained pursuant to the AHERA asbestos standards. More specifically, PacifiCorp is willing to agree to the following specific conditions under Paragraph 22, second subparagraph, sub-sub-paragraph (c):

be accompanied by one or more PacifiCorp substation journeyman, who shall be AHERA 2-hour asbestos awareness trained. Respondent shall ensure at least one substation journeyman is available every work day and on call for emergencies during off hours. Respondent shall ensure that a substation journeyman will be available, on site at the PacifiCorp Property, within a reasonable time after a request for access is made. Accompaniment of a substation journeyman is not required for entry into areas of the PacifiCorp Property where electrical equipment is not located, when such areas are demarcated by physical barriers (fences and walls).

Please note that OSHA has specific requirements applicable to electrical substations that EPA and its subcontractors will need to understand and comply with.

10. Confidential Information. In PacifiCorp's original markup to the AOC, limited modifications were suggested in Paragraph 27 to clarify the nature of the information to be disclosed to EPA in the event of the company withholds any records under claim of privilege. Specifically, PacifiCorp should not be required to disclose the "contents" of such communications but rather "a brief description of the type of communication constituting the document, record, or information." PacifiCorp also objects to the final sentence of Paragraph 27 insofar as it requires waiver of otherwise applicable privileges relating to documents or information pertaining to the AOC.

11. Notice of Releases. The provisions of Paragraph 34 should apply only in the event of a release of a *reportable quantity* of a hazardous substance.

12. Stipulated Penalties for Work Takeover. The stipulated penalty for a work takeover (Paragraph 49) remains unacceptable to PacifiCorp for the reasons stated in Mike Jenkins' letter. We understand that the new model AOC includes this provision, as you say, to provide incentives for parties to complete work. We also understand that the regions enjoy substantial discretion to modify the model AOC to address specific concerns and site issues and we have yet to negotiate an AOC in which EPA has been unwilling to eliminate this provision when a conscientious cooperative corporate party is involved. PacifiCorp has sufficient incentives and resources to complete the work. This is not a question, as you state in your letter, of PacifiCorp's intent to complete the work in a timely and satisfactory manner. PacifiCorp's long track record with Region VIII clearly provides ample evidence of its intent and ability to complete this project. Rather, PacifiCorp believes the provision is fundamentally unfair; EPA retains the sole discretion to declare a work takeover, irrespective of PacifiCorp's intent or actual performance, and PacifiCorp may have no meaningful remedy to dispute a work takeover, and then recover on at least two levels that accumulate on each other. Inviting PacifiCorp to "trust EPA" in a letter is insufficient to address these concerns. PacifiCorp asks again that this language be removed in its entirety.

13. E-Mail. PacifiCorp would like the ability to use confirmed e-mail delivery as a recognized means of communication under the AOC (e.g. Paragraph 76). This would speed up the process and more accurately reflect the reality of managing a site such as this in the ordinary flow of information in the field.

14. Miscellaneous Issues. In paragraph 1, note that PacifiCorp is doing business as "Utah Power," not "Utah Power & Light" as stated. In paragraph 4, sixth line from top: "proceeding for enforce" should be "proceeding to enforce." There are two paragraphs numbered 8. There is no subparagraph "i" under paragraph 8 (definitions). The definitions should also refer to the specific Action Memorandum we understand has now been issued. In paragraph 8 (Findings of Fact), seventh subparagraph, "Utah Power and Light Substation" should be changed to "PacifiCorp Property." For purposes of paragraph 10.x., Mr. Wilson's cell number is (503) 860-2307 (this was not included in the last draft). PacifiCorp would appreciate EPA providing similar contact information for Mr. Nichols. In the third subparagraph under Paragraph 22, the language should read that "EPA agrees to comply with those relevant and appropriate portions of health and safety plan and policies, rules," In Paragraph 38, the introductory clause referring to "Past Response Costs" appears to have been included inadvertently, as we understand that all issues related to such costs have been deferred until a later time. In Paragraph 69, "agree" should be plural ("agrees"). We would be happy to make these corrections if you send us an electronic version of the AOC.

As stated in the introduction, PacifiCorp is ready to mobilize immediately to implement the work described in the Work Plan. We remain concerned, however, that the resolution of the foregoing issues pertaining to the AOC will unnecessarily delay this process. In the interest of expediting this process, we would recommend scheduling a conference call at your earliest convenience, prior to circulation of the next draft AOC. Please call so that we can discuss how to proceed.

Very truly yours,

LEBOEUF, LAMB, GREENE & MACRAE, L.L.P.



Kevin R. Murray

KRM:js

cc: Michael Jenkins
David Wilson
Jeffery Tucker